
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

FRANK KARL SELBY,
STEVEN ARTHUR CLARK,
PAUL EVANS CARBONE,
CAROL NALANI PALMIERI,
and ELAINE ROSE FODOR,
Appellees.

No. 22,719

On Appeal from An Order of
The United States District Court
For the District of Arizona

OPENING BRIEF OF APPELLANT

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1.

JURISDICTIONAL STATEMENT OF FACT

This case was instituted by the filing of an Indictment which was returned by the Federal Grand Jury on November 8, 1967. (Clerk's Record on Appeal, Item 1. Hereinafter the Clerk's Record on Appeal will be referred to as "RC"; the

reporter's transcript of the testimony at the hearing on the Motion to Suppress will be referred to as "RT," the number following will refer to the page, and the number following "L" will refer to the line. The Appelles, Frank Karl Selby, Steven Arthur Clark, Paul Evans Carbone, Carol Nalani Palmieri and Elaine Rose Fodor will be referred to by their surnames or as "Appellees.")

The Indictment, in two counts, charged all Appellees in Count I with having formed a conspiracy sometime prior to October 27, 1967, and continuing thereafter until on or about October 27, 1967, at Lukeville, State and District of Arizona, and elsewhere to import, receive, conceal, buy, sell and facilitate the transportation, concealment and sale of approximately 332 pounds of bulk marijuana after the said marijuana had been brought into the United States of America from Mexico contrary to law, knowing the same had been imported and brought into the United States contrary to law; all in violation of 21 U.S.C. §176a. The second count charged Selby and Palmieri with having knowingly and with intent to defraud the United States of America, imported approximately 332 pounds of bulk marijuana contrary to law at Lukeville, Arizona, all in violation of 21 U.S.C. §176a (RC Item 1).

On November 17, 1967, Selby, Clark, and Carbone filed a motion to reduce bail. (RC Item 9, docket entries) (On November 1, 1967, Fodor and Palmieri were released on personal surety bonds.) On November 20, 1967, all Appellees were arraigned, pleaded not guilty, were allowed ten days for Motions, and the said motion was denied. (RC Item 9) Trial was set for December 27, 1967. On December 5, 1967, Appellees filed a Motion to Continue. (RC Item 9) On December 8, 1967, the Government filed a Memorandum in Opposition and on December 11, 1967, the Motion was

denied. (RC Item 9) On December 6, 1967, Clark was released on \$10,000 bond secured by a 10% deposit and on December 11, 1967, Carbone was released on \$10,000 bond secured by a 10% deposit. (RC Item 9)

On December 22, 1967, Appellees filed a Motion for Return of Property and to Suppress. (RC Item 2) On December 27, 1967, the Government filed a Memorandum in Opposition and the Motion was heard. (RC Item 4 and 9) The Trial Court granted the motion, and the Government moved to reduce Selby's bail to \$10,000 personal surety and was released. (RC Item 9)

The Government filed Notice of Appeal on January 26, 1968 (RC Item 6), and avowed the purpose of the Appeal is not for delay. (RC Item 6, L 20-21)

The Trial Court had jurisdiction of the case by reason of the provisions of 18 U.S.C.A. §3231. The Government is authorized to appeal orders granting motions to suppress by the provisions of 18 U.S.C. §1404. This Court has jurisdiction of this Appeal by reason of the provisions of 28 U.S.C.A. §1294 (1).

Jo Ann D. Diamos avows this Appeal is not for the purpose of delay.

II.

STATEMENT OF FACTS

Selby and Palmieri drove a camper up to the Port of Entry at Lukeville, Arizona, at approximately noon on October 27, 1967, and told the customs inspector on duty that they were vacationing and going to Mazatlan, Mexico and needed an affidavit in order to obtain a Mexican Tourist car permit. They stated that they wished to enter the United States briefly so

that they could have the affidavit witnessed by a notary public whose office was in a trailer park a short distance from the port, and the inspector permitted them to pass after a cursory examination of the inside of the camper. (RT 56, L 1-14) (This is a town having a population of 40 people which is under the investigative jurisdiction of the Nogales Office of the U.S. Customs Agency Service. It cannot be reached directly from Nogales by car. The highway connection is from Nogales to 4 miles south of Tucson, west to Ajo, and south to Lukeville, a distance of approximately 160 miles. There are no law enforcement officers of any level of government in Lukeville.)

As the camper pulled away, the other three Appellees drove up to the port in a Volkswagon, stated they had nothing to declare, were cleared after their names were noted, and then parked across the street. The camper had meanwhile gone into the trailer court, but when it came out, instead of returning to the border, it turned and started north. The Volkswagon pulled out immediately and followed it. (RT 60-66)

The Port Director called his superior in the Nogales Customs Office and asked him if he knew any of the five people who had passed through in the camper and the Volkswagon. (RT 92) The Nogales agent stated that, while he had been working in the Orange County, California police department and in the Customs Agency there, four of the persons named (excluding Palmieri) had been arrested for marijuana violations. RT 137-140) He then ordered the Port Director to call the Sheriff's Office in Ajo, a town about forty miles north of Lukeville, and ask him to stop the two cars and bring the occupants back to the port so that they could be given the opportunity to register in accordance with 18 U.S.C. §1407 and so that the camper could be searched. (RT 137-140)

The cars were stopped by deputy sheriffs near Ajo forty-five minutes to an hour later, and the Appellees, driving their own vehicles, were escorted back to Lukeville. (RT 13) There the Port Director told them of the registration requirements, and all of the Appellees stated that they did not have to register. (RT 100) While this was being done (RT 180, L 13-17), one of the inspectors then went up to the camper and knocked on the passenger-side door, and when it sounded strange, he sniffed at the window opening and detected what he thought was the odor of marijuana. (RT 76-77) Thereupon, the door panel was removed, and the several bricks of marijuana were discovered. (RT 98) The camper was then searched and additional bricks were found. (RT 98)

III.

SPECIFICATION OF ERRORS

The Court erred in granting Appellees' Motion for Return of Property and to Suppress Evidence since the search was based on probable cause.

IV.

ARGUMENT

“The facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief” that Appellees were, when searched, possessed of illegal contraband.

Appellees' Motion for Return of Property and to Suppress

Evidence based the motion on the provisions of Rule 41(e), Federal Rules of Criminal Procedure, 18 U.S.C.A. (RC Item 2, 1, L 24-27)

The Government's Memorandum in Opposition relied on Border search and on probable cause for the search. (RC Item 4, 2, L 3-9)

The Court at the hearing of the Motion to Suppress, rejected the Government's theory of Border search (RT 157, L 5-6) and did not find probable cause for the detention of the vehicles and return to the border. (RT 160, L 10-11)

The two vehicles entered separately. The second car parked across the street and waited until the camper, the first vehicle, left the trailer park and headed north. It then headed north. The first vehicle's occupants stated to the inspector they were headed for Mazatlan, Mexico, but needed an affidavit executed to obtain a Mexican Tourist Car Permit. Instead of returning the vehicle headed north.

The inspector had noted the names of both vehicles, and when the inspector called the Customs Agency Office in Nogales, Arizona, he informed Customs Agent Hugh Marshall of the five names and the actions of the two vehicles:

"A Mr. Ramsey in essence advised me of the fact that a Chevrolet camper bus being driven by a man by the name of Frank Selby, and he said had a girl in there, a Hawaiian girl, he thought her name was Palmere, something to that effect, had entered from Mexico, Sonora, at the port of entry at Lukeville, had requested to go to the notary public's office, which is located approximately two or three blocks north of the port to get some papers notarized so they could effect a journey into Mazatlan, that Mexican Customs required they have some notarized papers on the vehicle. And that they, "they" meaning apparently he or his office had permitted this vehicle with Mr. Selby and Miss, as he put it, Palmere, to proceed. He said right

behind it came a VW bus and this VW bus also had California plates and said it was driven by Mr. Clark, occupied by Rose Fodor and Carbone, Paul Carbone in the back sleeping. He advised that they went through the bus a little bit, searched it down a little bit and permitted it to proceed. They watched it and as they watched the bus go across the street, stop, remain for a few moments and at that time they began to wonder about the camper pick-up which was supposed to return and at that time they noticed the camper pick-up come out of the trailer court where the notary was and proceed north without returning. They said at that very same moment that the VW left its parked position and appeared to catch up with the camper bus and both vehicles to proceed north out of sight. That would be the essence of the conversation." (RT 138, L 24 to 140, L 1)

Agent Marshall knew through his previous duty station, that Selby, Clark and Fodor had been arrested for possession of marijuana and whose trials had been pending when he left. (RT 140) He had information that Carbone was smuggling marijuana from Tijuana. (RT 143, L 24 to 144, L 5)

Marshall ordered Ramsey to have the cars intercepted in Ajo by the Sheriff's office and to have them returned to be checked out and to afford the occupants an opportunity to register. (RT 140, L 17-18)

Inspector Ramsey intended to search the camper when it was returned. (RT 100, L 5-6)

Title 19, U.S.C.A. §1461 provides that persons entering the country shall open their baggage and vehicles for customs inspection.

Title 19 U.S.C.A. §482 authorizes officers to stop and search vehicles both within and without their districts in which they may have a reasonable cause to suspect there is merchandise which was imported contrary to law.

When the Inspector sniffed at the door of the camper, he smelled what he believed to be marijuana.

As was held in *Carroll v. United States* (1925) 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280; *Brinegar v. United States* (1949) 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302, probable cause provides independent grounds for the search of a vehicle.

Vehicles carrying contraband are subject to seizure, 19 U.S.C.A., §1595a.

In *Sirimarco v. United States* (10th Cir., 1963) 315 F.2d 699, the defendant was arrested by New Mexico police on the request of Colorado authorities with whom a complaint had been filed charging him with passing a counterfeit note. When he was returned to Colorado and placed in the custody of state officials, a Secret Service agent was called in to inspect the alleged counterfeit bill. He confirmed that it was counterfeit and then searched defendant's car, discovering twenty-nine more bills hidden under the front seat. The court held that the agent had probable cause to believe that the car had been used to transport counterfeit bills and that, since he had the right to seize the car, the search was lawful even though he did not first assert formal control over it.

Title 19 U.S.C.A. §1595a provides:

“(a) Except as specified in the proviso to section 1594 of this title, every vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any other way, the importation, bringing in, unloading, landing, removal, concealing, harboring, or subsequent transportation of any article which is being or has been introduced, or attempted to be introduced, into the United States contrary to law, whether upon such vessel, vehicle, animal, aircraft, or other thing or otherwise, shall be seized and forfeited together with its tackle, apparel, furniture, harness, or equipment.”

The cars were subject to seizure.

In *Bailey v. United States* (5th Cir., 1967) 386 F.2d 1, at pages 2-3, the Fifth Circuit held:

"As this was a warrantless search not incident to an arrest, the government either must have a finding that probable cause existed or must excuse its absence by resort to the border search doctrine. No case has held that one who has not crossed an international boundary can be the object of a constitutionally permissible border search, and we do not reach that question. Rather, we assume the view of the searching officers, and hold that 'the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief' that appellants were, when searched, possessed of illegal narcotics."

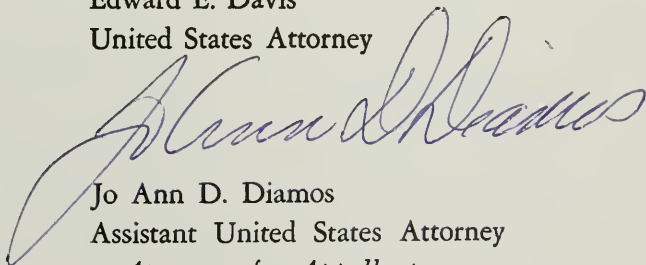
V.

CONCLUSION

It is respectfully submitted that there was probable cause to search the vehicles, and the Order granting the Appellees' Motion for Return of Property and to Suppress Evidence should be reversed.

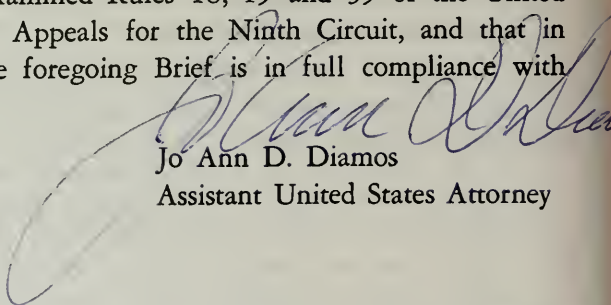
Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



Jo Ann D. Diamos

Assistant United States Attorney

Three copies of the Brief of Appellee mailed this ...*1st*...
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